Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 1994

DELCO DEVELOPMENT COMPANY, INC., ET AL.,
Petitioner

v.

MECHANICS AND FARMERS SAVINGS BANK, FSB,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

GARY GINSBERG
ROBERT GINSBURG
DELCO DEVELOPMENT COMPANY, INC.
Petitioners

GERALD T. WEINER
Bar #109631
Weinstein, Weiner, Ignal, Vogel & Shapiro, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 384-9361
Counsel of Record

PAUL M. KAPLAN
377 Main Street
West Haven, CT 06516
(203) 891-0999
Counsel of Record

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QUESTIONS PRESENTED

I. Whether the petitioners' federal right to due process of law was violated by the Connecticut state courts' implicit holding that the provisions of 12 U.S.C. § 1823(e), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, could be applied retroactively to defeat a defense of payment with respect to a loan agreement that originated prior to the effective date of the amendment, but whose terms were modified after the effective date of the amendment?

II. Whether assuming that 1823(e) as amended was fully retroactive, the state court violated due process rights of Petititoners by concluding that the statute requirements were not met or complied with.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The petitioners, Gary R. Ginsberg, Robert Ginsburg and Delco Development Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on April 11, 1995.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court on petitioners' direct appeal, Mechanics & Farmers Savings Bank, FSB v. Delco Development Co., is officially reported at 232 Conn. 594 (1995), and is reprinted in the Appendix to this petition, at pp. 1A-5A. That opinion is unofficially reported at 656 A.2d 1034.

The written opinion of the trial court is officially reported at 43 Conn. Sup. 408 (1993), and is reprinted in the Appendix to this petition, at pp. 6A-22A. That opinion is unofficially reported at 656 A.2d 1075.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on April 11, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1257(a) of Title 28 of the United States Code provides as follows: "Final judgments or decrees

rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

This petition is the result of an unsuccessful appeal, in the Connecticut state courts, from a judgment of strict foreclosure rendered against petitioners Gary R. Ginsberg, Robert Ginsburg and Delco Development Co., Inc. (Delco). The state trial court judgment was issued on August 30, 1993, following a three-day bench trial, and that judgment was affirmed by the Connecticut Supreme Court on April 11, 1995.

A. Overview of the Case

The essence of this case is the state courts' rejection of petitioners' defense of payment on a loan obligation -- a rejection that was based on 18 U.S.C. § 1823(e) and its common-law "counterpart," the D'Oench,

Duhme[1] doctrine.

In its opinion affirming the judgment, the Connecticut Supreme Court summarized the basic facts relating to this litigation:

> On May 17, 1988, Delco borrowed $3,500,000 from the Mechanics and Farmers Savings Bank, FSB (bank). On that same date, Delco executed a variable rate promissory note to the bank for that amount. The note was secured by a mortgage on real estate owned by Delco at 249 Putnam Avenue, Hamden [Connecticut]. Dennis Nicotra, Gary Ginsberg and Robert Ginsburg, shareholders in Delco, signed written guarantees unconditionally guaranteeing to the bank the prompt payment of all obligations due under the note. Thereafter, the loan to Delco was restructured and the terms of the note were modified by a modification agreement among the parties dated February 21, 1990. The guarantors of the note consented to the modification and their guarantees were not affected. Subsequently, Delco defaulted on its loan and the bank instituted an action for strict foreclosure against Delco and for deficiency judgments against Delco and the guarantors of the note. On August 9, 1991, the Director of the Office of Thrift Supervision determined that the bank was insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The

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[1] D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed.2d 956 (1942).

FDIC was thereafter substituted for the bank as the party plaintiff in the foreclosure action.

***

In their fifth special defense, the defendants claimed that the note secured by the mortgage had been partially paid and satisfied. The trial court rejected this defense and found that the amount due the plaintiff was the full amount of the note plus interest, attorney's fees and costs. The defendants contend that the trial court was incorrect in so finding.

The defendants argue that the note secured by the mortgage was partially paid and satisfied when the bank entered into a satisfaction agreement and an intercreditor agreement with Nicotra and Nicotra's other creditors in July, 1991. The defendants claim that, although they were not parties to those agreements, they, nevertheless, should be the beneficiaries of the reduction of $2,024,000 in the amount of the debt due the bank. The defendants assert that this was the value placed on the agreements by the bank and that the agreements were accepted as partial payment by the bank for the obligation secured by the mortgage.

The trial court concluded that "there is simply no legal or equitable basis upon which the defendants can argue that an agreement negotiated by Dennis Nicotra to satisfy his debts, which apparently failed in the end, is applicable to them." The court also

> concluded that the defendants' fifth special defense was not valid as to the FDIC because the agreements on which that special defense was based failed to meet all the requirements of 12 U.S.C. § 1823(e). See also D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed.2d 956 (1942). Accordingly, the court found that the FDIC was entitled to judgment on the outstanding principal amount of the note [$3,500,000], plus interest.[2]

We agree with the trial court's conclusion on both issues as set forth in its thoughtful and comprehensive memorandum of decision. Mechanics & Farmers Savings Bank, FSB v. Delco Development Co., 43 Conn. Sup. 408, 656 A.2d 1075 (1995). Because the court's memorandum of decision fully addresses the issues properly raised by the defendants in the present appeal, we adopt its decision as a statement of the facts and applicable law on these issues.
(Emphasis added.) Mechanics & Farmers Savings Bank, FSB v. Delco Development Co., supra, 232 Conn. 595-98.

In order to place the petitioners' claims in proper focus, it is necessary to provide some additional details

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[2] Interest was calculated at a per diem rate of $777.77. As of the date of the trial court's decision (Aug. 30, 1993), the accrued interest amounted to $1,198,506.95, bring the total debt to $4,698,506.95. See Mechanics & Farmers Savings Bank, FSB v. Delco Development Co., supra, 43 Conn. Sup. at 423; App. 21A.

concerning two essential documents involved in this litigation -- the Satisfaction and Intercreditor Agreements.

B. The Satisfaction Agreement

At the trial, petitioners presented evidence that in 1990, Dennis Nicotra, one of the guarantors on the Delco note, commenced "global settlement discussions" with a number of Nicotra's creditors. These settlement discussions included discussions between Nicotra and the bank (hereafter "M & F"). The discussions were an attempt to resolve Nicotra's problems with respect to a large number of loans -- one of which was the Delco loan at issue in this case.

An accord was reached in the spring of 1991, when Nicotra and M & F negotiated a Satisfaction Agreement. In March of 1991, Nicotra met with M & F bank officials to work out the mechanics of the Satisfaction Agreement. Later that month, Nicotra received confirmation from M & F that the bank committee had approved the Satisfaction Agreement. The Satisfaction Agreement was signed by Nicotra on July 24, 1991 (its "effective date"), and was signed on August 2, 1991, by David Sullivan, president of M & F, as well as representatives of other banks that were involved. Nicotra's attorney knew that at the time, M & F was "under an FDIC watch," and that the Satisfaction Agreement had to be approved either by the board of directors, or the loan committee of the bank. At the August 2, 1991 closing on the Satisfaction Agreement, M & F's attorney "indicated that they had the approval and exhibited a copy of the minutes of the meeting where [the satisfaction agreement] was approved." (Emphasis added.)

(Testimony of Nicotra's attorney.)

The Satisfaction Agreement outlined Nicotra's indebtedness to various banks, financial institutions, and individuals; and the values of his assets. The document constituted an assignment of Nicotra's assets for the benefit of the participating creditors. In exchange, the creditors agreed to look solely to the assigned assets for satisfaction of Nicotra's obligations to them.

The Satisfaction Agreement specifically addressed the Delco loan, and the foreclosure action that had been initiated by M & F. Section 3.02 of the Satisfaction Agreement provided that M & F would pursue its foreclosure against Delco, as well as any deficiency claims against defendants Ginsburg and Ginsberg. However, if any claim for contribution were made against Nicotra by Delco, Ginsburg, or Ginsberg, Nicotra would be indemnified by M & F and Great Country Bank to the extent that the two banks actually obtained recoveries aggregating in excess of $1 million. In other words, any amount in excess of $1 million, that M & F might recover against Delco, Ginsburg or Ginsberg, would be subject to being handed over to Nicotra in fulfillment of the bank's obligation to indemnify Nicotra.

C. The Intercreditor Agreement

Concomitantly with the execution of the Satisfaction Agreement, the participating creditors entered

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into an agreement entitled Intercreditor Agreement.[3] In that document, Nicotra outlined his debts; his plans to satisfy those debts; and the relationship between his various creditors with respect to repayment of his debts. Essentially, the Intercreditor Agreement set forth procedures for the liquidation of the assets assigned by Nicotra, and the distribution of the proceeds.[4] As each asset was liquidated, creditors whose claims were secured by that asset, were to be paid. All excess proceeds were to be put into a pool for the benefit of the remaining creditors, together with the anticipated proceeds from a note for $4.4836 million dollars owed to Nicotra. The net effect of the agreement was to give M & F approximately 9.13% of what was essentially a blanket security interest in the assets assigned by Nicotra.

The net effect of the Satisfaction and Intercreditor Agreements was to bestow a benefit on M & F. As set forth in Schedule 1.11 to both agreements, Nicotra was indebted to M & F for approximately $6 million: $3.4 million was treated as secured by the Delco mortgage; $1.9 million was regarded as subordinate mortgage debt;

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[3] The effective date of the Intercreditor agreement was July 24, 1991, provided the agreement was signed by the necessary parties on or before August 2, 1991. The Intercreditor Agreement was signed by M & F's president, David Sullivan, on Aug. 2, 1991.

[4] Section 18 of the Intercreditor Agreement specifically addressed Delco's obligation to M & F.

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and almost $700,000 was unsecured. Nicotra was over $64 million in debt to all of his creditors, and his assets were valued at $46 million. As a result of the agreements, Nicotra avoided bankruptcy, which would have been disastrous not only for M & F, but for all of his other creditors. In addition to avoiding the bankruptcy, the agreement gave M & F a 9% stake in the asset pool which it would not otherwise have had, and gave M & F a priority position with respect to a separate $600,000 obligation owed to it by Nicotra.

D. The Two Million Dollar Reduction in the Loan Balance

M & F clearly placed a value on that which it received pursuant to the Satisfaction and Intercreditor Agreements. For one thing, by agreeing to indemnify Nicotra to the extent of any recovery from Delco, Ginsburg, or Ginsberg in excess of $1 million, the bank valued the benefits it was receiving from the Satisfaction and Intercreditor Agreements at $1 million less than the amount then owed on the Delco note. And the record showed as much. For on March 12, 1991 -- contemporaneous with M & F's approval of the Satisfaction Agreement -- M & F reduced the principal balance on the Delco loan from $3.5 million to $1,476,000, a reduction of $2,024,000. This $2,024,000 figure represented the agreed upon value of assets that had been put into the pool for the benefit of M & F; accordingly, M & F reduced the Delco balance by that amount. Subsequently, on August 9, 1991, M & F failed, and the FDIC was appointed as Receiver of M & F. That same day, the Consolidated Assets Recovery Corporation (hereafter "CARC") was formed, for the purpose of

servicing loans for the FDIC as Receiver of M & F. It was undisputed that both the Satisfaction Agreement and the Intercreditor Agreement were in CARC's files from its inception.

E. Now You See It, Now You Don't

Testimony of CARC officials established that, at least for a while, the Delco account had been credited more than two million dollars. Specifically, a computer-generated loan statement in CARC's possession, reflected a $2,024,000 transaction that was posted on March 12, 1991, on the Delco account -- showing a remaining principal balance of only $1,476,000. CARC's chief financial and administrative officer explained that M & F occasionally decided to "charge off" a loan. In this instance, M & F "processed a transaction of March in ninety one for two million and twenty four thousand dollars reducing this record by that amount to indicate that they were partially intending to charge off the loan." (Emphasis added.) Seven months later -- on Oct. 1, 1991 -- the Delco account sheet still showed a then-current balance of $1,476,000.

CARC's chief financial officer further testified that the 2 million dollar transaction was a partial charge-off (or "adjustment to principal"), rather than a payment, because it did not have the particular "trans-code" number that is used to designate payments. Accordingly, the FDIC then directed M & F "to restore all partial charge-offs to the computer records unless there had been a legal discharge of that debt," and the $2,024,000 credit was simply removed from the Delco account -- putting the balance back to $3.5 million. In other words, by the simple

expedient of pressing the "delete" button on a computer keyboard, the FDIC unilaterally erased a $2,024,000 credit that M & F had voluntarily bargained for, and which it had applied to the Delco account.

REASONS FOR GRANTING THE WRIT

As noted earlier, the state trial court rejected the petitioners' defense of partial payment, on the grounds that the Satisfaction Agreement failed to meet all the requirements of 12 U.S.C. § 1823(e); Delco I, supra 421, at App. 19A; and the Connecticut Supreme Court agreed with that conclusion. Delco II, 597-98, at App. 4A-5A. (The state trial court, however, acknowledged that the defense of payment is recognized at common law to an action on a note and mortgage. If evidence of the Nicotra agreement would have been considered by the trial court, then payment of the note pursuant to the agreement would, of course, constitute a payment for all obligors, including the petitioners). In rejecting the defense of payment on the strength of § 1823(e), the trial court implicitly found that that statute was fully applicable to the transaction in this case. However, the state trial court overlooked an important threshold question of federal law -- a question on which courts of appeals have expressed conflicting opinions -- i.e., whether § 1823(e), as amended in 1989, applies retroactively to a loan transaction that was initiated prior to the effective date of the amendment.

This retroactivity claim was raised by petitioners in their direct appeal to the Connecticut Supreme Court. However, the Connecticut Supreme Court refused to consider the claim since it had not been raised in the trial court. See Delco II, at 598 n.3, at App. 5A.

The record shows that the existence of a retroactivity issue was implicitly suggested in M & F's trial brief. See id., at 16 (asserting that § 1823(e) applies to the FDIC in its receiver capacity), and at 22 (noting that § 1823(e) was amended in 1989 to extend certain protections to the FDIC when it acts in a receivership capacity). However, inasmuch as the retroactivity question was neither litigated nor expressly ruled upon at trial, the petitioners on appeal sought review of the retroactivity issue pursuant to Connecticut's "plain error" rule. That rule, set forth in § 4185 of the Connecticut Practice Book, provides in pertinent part that "[t]he court may in the interests of justice notice plain error not brought to the attention of the trial court."

It is significant that the Connecticut Supreme Court has frequently accorded plain error review in instances where, as here, trial courts or litigants have "overlooked" the effect of a statute or statutory amendment. See, e.g., Hartford Federal Savings & Loan Association v. Tucker, 181 Conn. 607, 609 (1980) ("An oversight of a clearly applicable statute can be considered plain error."); State v. Preyer, 198 Conn. 190, 199 (1985) (same, citing other cases); State v. Turello, 183 Conn. 330, 332, 337 (1981) (plain error review of trial court's "erroneous construction of the governing statutes."). As this Court has observed, "state procedural requirements which are not strictly or regularly followed cannot deprive [the Supreme Court of the United States] of the right to review." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Accordingly, since the Connecticut Supreme Court refused to review the retroactivity question by relying on a state procedural rule that is not uniformly followed, that court's refusal does not constitute an adequate and independent state ground so

as to bar review by this Court.

The petitioners' overarching claim is that 12 U.S.C. § 1823(e), as amended in 1989, could not be applied retroactively to defeat defenses relating to a loan transaction that originated in 1988. This retroactivity claim is concededly dependent upon an antecedent proposition -- that § 1823(e), and the common law doctrine announced in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, reh. denied, 315 U.S. 830 (1942), are neither identical nor coextensive. If, as petitioners contend, the statute and the D'Oench, Duhme doctrine are materially different, then the retroactivity question is critical: for the state trial court relied principally on the statute, rather than the common law doctrine, to defeat the petitioner's special defense of payment. Stated another way, the petitioners' defense of payment was more likely to prevail if the transaction in question was evaluated under the common law D'Oench, Duhme doctrine,[5] rather than under the more rigorous

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[5] Petitioners argued on appeal that they had not 'lent [themselves] to a scheme or arrangement' whereby banking authorities are likely to be misled." NCNB Texas National Bank v. Johnson, 11 F.3d 1260, 1268 (5th Cir. 1994). Moreover, the trial court found no evidence of an intent to deceive. See Delco I, at 418; App. at 16A ("This is not to suggest that either the bank or the [petitioners] intended to deceive the regulatory authority by the manner in which this loan transaction was conducted."). In fact, the lexicon so prevalent in D'Oench litigation -- words like "deceptive," "misleading," "secret agreement," and "scheme" -- were conspicuously inapplicable here.

"categorical" requirements of § 1823(e). Thus, due to the interrelationship between the retroactivity question, and the subsidiary question of whether the statute and common law doctrine are different, both issues will be discussed below.

A. The D'Oench, Duhme Doctrine

In D'Oench, Duhme, this Court "fashioned a common law rule of estoppel preventing a borrower from asserting a defense against the FDIC on the basis of secret or unrecorded 'side agreements.'" FDIC v. Wright, 942 F.2d 1089, 1093 (7th Cir. 1991). As stated in the D'Oench opinion:

> The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled. (Emphasis added.) Id., 460.[6]

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[6] Although D'Oench involved the FDIC in its corporate capacity, it has been consistently held that D'Oench also applies where the FDIC acts in its capacity as a receiver. FDIC v. Wright, supra, 1093. See Timberland Design, Inc. v. First Service Bank for Savings, 932 F.2d 46, 49 (1st Cir. 1991) (citing cases).

The basic effect of the D'Oench, Duhme doctrine is now well-established: "Specifically, [the D'Oench doctrine] bars defenses and claims by borrowers based on unrecorded agreements with the failed bank." (Emphasis added.) NCNB Texas National Bank v. Johnson, 11 F.3d 1260, 1267 (5th Cir. 1994); NCNB Texas National Bank v. King, 964 F.2d 1468, 1470 (5th Cir. 1991) (same), cert. denied, 112 S.Ct. 2305 (1992). "In particular, D'Oench bars the use of unrecorded agreements between the borrower and the bank as the basis for defenses or claims against the FDIC." (Emphasis added.) Bowen v. FDIC, 915 F.2d 1013, 1015-16 (5th Cir. 1990); McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 368 (5th Cir. 1993); OPS Shopping Center, Inc. v. FDIC, 992 F.2d 306, 309 (11th Cir. 1993) ("A maker who lends himself to a scheme or arrangement whereby the banking authority is likely to be misled cannot make a claim against the FDIC on the basis of such a secret scheme or arrangement.") (Emphasis added.).

The primary public policy purpose behind this estoppel doctrine is equally clear: it allows the FDIC to rely on a bank's records (as opposed to secret agreements), so that the FDIC can accurately and quickly determine the value of an insolvent bank. See FDIC v. Singh, 977 F.2d 18, 23 (1st Cir. 1992) (D'Oench doctrine is "designed to 'help the FDIC accurately and speedily determine an insolvent bank's value.'"); Vernon v. Resolution Trust Corp., 907 F.2d 1101, 1104-1105 (11th Cir. 1990); FDIC v. P.L.M. International, Inc., 834 F.2d 248, 252 (1st Cir. 1987) (noting the federal policy of "protecting the FDIC from misrepresentations and secret agreements which might result in it incorrectly assessing the value of bank holdings...."); see also, Langley v. FDIC,

484 U.S. 86, 91-92 (1987) (discussing the two purposes behind 12 U.S.C. § 1823(e)).

Under the facts of the D'Oench case, the maker of the note was "a knowing participant to the fraudulent scheme: the customer knew that the agreement misrepresented the assets of the bank." Dennis and Simon, Litigation with the FDIC and the RTC: The Evolving D'Oench Doctrine Superpower Defense, 47 Bus. Law. 1319, 1321 (May 1992). See D'Oench, supra, 315 U.S. at 461 (noting that petitioner "was responsible for the creation of the false status of the note in the hands of the bank").

B. The Statutory Scheme

In 1950, eight years after the D'Oench, Duhme decision, Congress enacted 12 U.S.C. § 1823(e). It presently provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement --
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the

acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

This Court has noted that § 1823(e) serves dual purposes. One purpose "is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." Langley v. FDIC, supra, 91-92. A second purpose of § 1823(e) to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." Id., 92.

C. The Relationship Between D'Oench, Duhme and § 1823(e)

Trying to divine the proper relationship between the D'Oench common law doctrine, and "the categorical recording scheme embodied in sec. 1823(e)"; FDIC v. Singh, supra, 26 (concurring opinion); is not a simple task. Often, courts simply describe the statute as a codification of, or counterpart to, the D'Oench common law doctrine. See e.g., FDIC v. Wright, supra, 1096 ("[s]ection 1823(e) as amended simply codified the existing common law D'Oench doctrine by giving it 'statutory backing.'"); Bowen v. FDIC, supra, 1016 (§ 1823(e) "is essentially a

codification of D'Oench, Duhme."); FDIC v. Hamilton, 939 F.2d 1225, 1230 (5th Cir. 1991) (§ 1823(e) is "the statutory companion of the D'Oench, Duhme doctrine"). Under this view, "courts have found the aims of section 1823(e) and D'Oench identical and thus have construed defenses premised upon section 1823(e) and D'Oench in tandem." Twin Construction, Inc. v. Boca Raton, Inc., 925 F.2d 378, 382 (11th Cir. 1991); FDIC v. Wright, supra, 1096 and 1098 n.11.

Other courts, and commentators, have flatly recognized that the common law doctrine, and the statute, are distinct. See Lesal Interiors, Inc. v. Echotree Associates, L.P., 47 F.3d 607, 612 (3rd Cir. 1995) ("There is authority for the proposition that the federal common law rule recognized in D'Oench is not coextensive with the terms of 12 U.S.C. § 1823(e).") (Emphasis added.); E.I. du Pont de Nemours & Co. v. F.D.I.C., 32 F.3d 592, 596-97 (D.C.Cir. 1994) ("...the statute is both broader and narrower than the D'Oench doctrine itself. It is broader in that the statute makes the fault of the party asserting the unwritten agreement irrelevant, whereas the common law doctrine is based upon the concept of equitable estoppel...."); Murphy v. FDIC, 12 F.3d 1485, 1490 (9th Cir. 1993) ("The D'Oench, Duhme equitable doctrine and § 1823(e) are often dealt with interchangeably, but they are not identical."), vacated on other grounds, 38 F.3d 1490 (9th Cir. 1994); Hall v. FDIC, 920 F.2d 334, 339 (6th Cir. 1990) ("It is settled that D'Oench and § 1823(e) are not identical in scope. We have already recognized that the D'Oench doctrine has broader application than § 1823."); Dennis and Simon, op. cit., 1322-1323 ("'the protection afforded by the doctrine and the statute are

distinct'"); Federal Savings & Loan Insurance Corp. v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991) ("The D'Oench Duhme requirement is now embodied in part in federal statute."; "... Congress intended that [§ 1823(e)] serve as an adjunct to the federal statutory police embodied in D'Oench Duhme."); F.D.I.C. v. Oldenburg, 34 F.3d 1529, 1552 n.29 (10th Cir. 1994) ("...the legislative history of section 1823(e) does not even mention the D'Oench case."); Kilpatrick v. Riddle, 907 F.2d 1523, 1529 n.2 (5th Cir. 1990) (Brown, J., dissenting) ("The often recited statement that § 1823(e) is a codification of D'Oench, Duhme does not bear analysis. The specific requirements of § 1823(e) are in no way provided, or even mentioned, in D'Oench, Duhme."), cert. denied, 111 S.Ct. 954 (1991); Flint, Why D'Oench, Duhme? An Economic, Legal, and Philosophical Critique of A Failed Bank Policy, 26 Val. U.L. Rev. 465, 468 n. 7 (1992) ("Such enactment [of the statute] did not actual (sic) codify D'Oench, as the specific requirements of section 1823(e) are not mentioned or eluded (sic) to in the case ... It is clear that the specific requirements of 1823(e) are not provided, nor for that matter, are they mentioned in D'Oench."); Hymanson, Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail, 62 S.Cal.L.Rev. 253, 271-72 (1989) ("the statute expands D'Oench, Duhme in that it applies to any agreement, whether or not it was 'secret,'and regardless of the maker's participation in a scheme. At the same time, however, the statute is narrower than D'Oench, Duhme in that it applies only to agreements, and not to other defenses the borrower might raise.") (Emphasis in original.); Palmer, The D'Oench Doctrine: A Proposal for Reform, 108 Banking L.J. 565, 568 (1991) (statute "is broader than D'Oench, because, ... it eliminates borrower culpability as a prerequisite to

application of the doctrine...."). The most logical conclusion to be drawn from the above, is this: the D'Oench common-law doctrine, and the statute, operate simultaneously in the same field, but they are not functional equivalents. As Judge Brown noted in his dissenting opinion in Kilpatrick v. Riddle, supra, 1529-30 n.2, the four requirements of § 1823(e) "are not the work of the Supreme Court," but are "exclusively the work of Congress. The distinction is more than rhetorical. The test established in D'Oench, Duhme is 'whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect.' D'Oench, Duhme, 315 U.S. at 460...."

D. FIRREA: The 1989 Amendment

Assuming, arguendo, that the statute and common law doctrine are not equivalent, the ultimate question is whether the 1989 statutory amendments may be given retroactive effect. That question of course, is one of federal, not state law: "suits brought by the FDIC are governed by federal law, and "[a] defense affected by section 1823(e) is governed by federal law." F.D.I.C. v. Oldenburg, supra, 34 F.3d at 1538, 1550. Accord, Resolution Trust Corp. v. Daddona, 9F.3d 312, 318-19 (3rd Cir. 1993). See also Lesal Interiors, Inc. v. Echotree Associates, L.P., supra, 612.

To understand the effect of the amendment, it is first necessary to recall that the FDIC "is authorized by statute to function in two separate and distinct capacities: 'the Corporation shall insure the deposits of all insured banks as provided in this chapter,' 12 U.S.C. § 1821(a)(1) (1988); 'the Corporation as receiver of a closed national

bank ... shall have the right to appoint an agent or agents to assist it in its duties as such receiver,' 12 U.S.C. § 1822(a) (1988)." FDIC v. Bernstein, 944 F.2d 101, 106 (2nd Cir. 1991). In other words, the FDIC as corporation, and the FDIC as receiver, are "discrete legal entities." Id. Accord, FDIC v. Wright, supra, 1090 n.1 (explaining "two separate roles" that the FDIC can assume "in its relationship to a failed bank.").

From the time of its original enactment, until August of 1989, § 1823(e) applied only to the FDIC acting in its corporate capacity, but did not apply to the FDIC when acting as a receiver. Vernon v. Resolution Trust Corp., supra, 1105; FDIC v. Wright, supra, 1094; Resolution Trust Corp. v. Sharif-Munir-Davidson Development Corp., 992 F.2d 1398, 1404 n.9 (5th Cir. 1993). Thus, at the time of the making of the original Delco note and guarantees (in May 1988), § 1823(e) did not apply to the FDIC as receiver.

Section 1823 was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, section 217(4), effective August 9, 1989; thereby "making section 1823(e) directly applicable to the FDIC in its receiver capacity." FDIC v. Wright, supra, 1094; accord, Resolution Trust Corp. v. Sharif-Munir-Davidson Development Corp., supra, 1404 n.9; Dendinger v. First National Corp., 16 F.3d 99, 101 n.2 (5th Cir. 1994); E.I. du Pont de Nemours & Co. v. F.D.I.C., supra, 596 (D.C.Cir. 1994). Thus, the question squarely presented in this petition is whether the amended version of § 1823(e) properly can be relied upon (by the FDIC as receiver) to defeat defenses relating to a transaction whose genesis predated the effective date of the amendment.

In advancing this claim, petitioners recognize that the Modification Agreement was executed on Feb. 21, 1990, after the effective date of amended § 1823(e). However, the Modification Agreement was not, by itself, an independent transaction. For example, neither a new note, nor a new mortgage deed, were executed at that time; and the guarantors' written consents to the modification, guaranteed payment "to the same effect as if said Guaranty dated May 17, 1988 had referred to the Note as modified." Plaintiffs Exhibits I, J and K. The 1990 modification was inherently part of the 1988 transaction, to which it related back; it had no independent viability. In fact, even the trial court seems to have recognized that there was only one transaction: "For the purposes of this decision, the 1988 and 1990 transactions will be referred to collectively as the 'loan transaction.'" Delco I, at 411; App. at 9A. That transaction should be governed by legal principles in effect at the time of its initiation, i.e., in 1988. The issue of whether § 1823(e) can be applied retrospectively, has been addressed by several federal courts of appeals. The First, Seventh and Eighth Circuits have found FIRREA to be retroactive with respect to § 1823(e). See FDIC v. Wright, supra, 1095-1097; FDIC v. Kasal, 913 F.2d 487, 493 (8th Cir. 1990), cert. denied, 111 S.Ct. 1072 (1991); North Arkansas Medical Center v. Barrett, 962 F.2d 780, 786-87 (8th Cir. 1992); Reding v. FDIC, 942 F.2d 1254. 1259 (8th Cir. 1991); FDIC v. Longley I Realty Trust, 988 F.2d 270, 273-74 (1st Cir. 1993). These courts reached this conclusion by relying on Bradley v. Richmond School Board, 416 U.S. 696 (1974), a case which instructs courts "to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the

contrary." Id., 711. At least one other circuit has declined to "consider whether the statute applies retroactively because" of its view that "both the statutory and common law doctrine bar similar defenses by borrowers." Dendinger v. First National Corp., supra, 101 n.2; Lemaire v. FDIC, 20 F.3d 654, 656 n.5 (5th Cir. 1994); see Alexandria Associates, Ltd. v. Mitchell Co., 2 F.3d 598, 603 n.31 (5th Cir. 1993) ("the common law and statutory D'Oench doctrines have been virtually interchangeable in our jurisprudence.").

The Tenth Circuit, however, reached an opposite conclusion in Oklahoma Radio Associates v. FDIC, 987 F.2d 685, 695-96 (10th Cir.), after remand, 3 F.3d 1436 (1993). There, the court held that "FIRREA does not, as to the strict and categorical requirements of § 1823(e), apply retroactively to the commercial transactions involved here which were entered into several years before the enactment of FIRREA." Id., 696. In reaching this conclusion, the Tenth Circuit relied on another decision of this Court, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), which holds that "congressional enactments ... will not be construed to have retroactive effect unless their language requires this result." Id., 208. See also United States v. 51 Pieces of Real Property, Roswell, N.M., 17 F.3d 1306, 1312 (10th Cir. 1994) (following Bowen, and citing Oklahoma Radio Associates, supra, in its discussion of whether an unrelated statute could be given retroactive effect). Thus, there is presently a direct conflict as to whether the "FDIC as receiver [should be] the beneficiary of the strict procedural requirements"; Oklahoma Radio Associates v. FDIC, supra, 695; which in this case were not available to the FDIC at the time the Delco loan was initiated.

The retroactivity issue presented by this case is also quite timely, in light of this Court's recent reconciling of the "apparent tension" between the Bradley and Bowen lines of precedent. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990). In Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994), this Court reconfirmed the historical "presumption against statutory retroactivity," and noted that "[t]he largest category of cases in which [the Court has] applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." (Emphasis added.) Id., 1500. As this Court summarized its holding:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.
>
> Id., 1505.

It is also noteworthy that this Court took the

opportunity in Landgraf to "make it clear that Bradley did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." Id., 1503. As noted earlier in the text, Bradley was relied upon by several of the circuits which have held FIRREA to be retroactive. Thus, Landgraf's recent clarification of the Bowen and Bradley lines of precedent, now casts serious doubt on the validity of those decisions holding FIRREA to be retroactive.

Given the existence of a direct conflict on this important question of federal law, the present case is an appropriate candidate for this Court's exercise of discretionary review. See R. 10.1 (b), (c), Rules of the Supreme Court of the United States.[7]

With respect to the second question presented, it is petitioners' contention that even if 1823(e) as amended is deemed to be fully applicable to the transaction in question, the state court erred in concluding that the statutory requirements were not met. First, the satisfaction agreement was in writing, as required by 1823(e)(1).

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[7] The "character of reasons that will be considered" in determining whether a case is worthy of a writ of certiorari, include "(b) [w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."; and "(c) [w]hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court...."

Second, there was evidence that the agreement had been approved by the board of directors or loan committee of the bank and that the approval was reflected in the minutes of said board or committee, thus satisfying 1823(e)(3). Third, the evidence clearly established that the agreement, which had been signed by the president of the bank, had been continually maintained as an official record of the depository institution (M & F) as required by 1823(e)(4). The additional requirement set forth in 1823(e)(2) that the agreement be executed contemporaneously with the acquisition of the asset by the depository institution was also satisfied since payment of a debt is almost always made after the initial signing of the note. This provision, therefore, cannot be taken literally since all payment defenses would never be considered under the statute as amended if the court strictly construed the word "contemporaneously".

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

RESPECTFULLY
SUBMITTED,

GARY R. GINSBERG,
ROBERT GINSBURG
DELCO DEVELOPMENT
COMPANY, INC.

PETITIONERS

GARY R. GINSBERG

BY: _____

GERALD T. WEINER
Bar #109631
Weinstein, Weiner, Ignal
Vogel & Shapiro, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 384-9361
Counsel of Record

ROBERT GINSBURG

BY: _____

PAUL M. KAPLAN
377 Main Street
West Haven, CT 06516
(203) 891-0999
Counsel of Record

DELCO DEVELOPMENT COMPANY, INC.

BY: _____

ERIC GROSS
Green & Gross
1087 Broad Street
Bridgeport, CT 06604
(203) 335-5141

In The

Supreme Court Of The United States

October Term, 1994

DELCO DEVELOPMENT COMPANY, INC., ET AL.,

Petitioner

v.

MECHANICS AND FARMERS SAVINGS BANK, FSB,

Respondent

APPENDIX

MECHANICS AND FARMERS SAVINGS BANK, FSB
v. DELCO DEVELOPMENT COMPANY,
INC., ET AL.
(15119)
(15120)

CALLAHAN, BERDON, NORCOTT, KATZ and PALMER, Js.

Argued February 10—decision released April 11, 1995

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant Dennis Nicotra et al. were defaulted and where the court, *Celotto, J.*, granted the motion filed by the Federal Deposit Insurance Corporation to be substituted as plaintiff; thereafter, the court, *Lager, J.*, granted the substitute plaintiff's motion for strict foreclosure and rendered judgment thereon, from which the named defendant et al. and the defendant Robert A. Ginsburg filed separate appeals to the Appellate Court, which, sua sponte, consolidated the appeals; the appeals were subsequently transferred to this court. *Affirmed; further proceedings.*

Gerald T. Weiner, with whom, on the brief, was *Eric Gross*, for the appellants (named defendant et al.).

Richard E. Castiglioni, with whom, on the brief, was *Geoffrey K. Milne*, for the appellee (substitute plaintiff Federal Deposit Insurance Corporation).

PER CURIAM. The dispositive issues in this appeal are whether the trial court properly: (1) rejected the special defense of partial payment and satisfaction of a promissory note of the defendants Delco Development Company, Inc. (Delco), Gary R. Ginsberg and Robert A. Ginsburg (defendants)[1]; and (2) calculated the interest on the debt owed by the defendants. The defendants appealed to the Appellate Court from the trial court's judgment of strict foreclosure, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199 (c). We affirm the judgment of the trial court.

On May 17, 1988, Delco borrowed $3,500,000 from the Mechanics and Farmers Savings Bank, FSB (bank). On that same date, Delco executed a variable rate promissory note to the bank for that amount. The note was secured by a mortgage on real estate owned by Delco at 249 Putnam Avenue, Hamden. Dennis Nicotra, Gary Ginsberg and Robert Ginsburg, shareholders in Delco, signed written guarantees unconditionally guaranteeing to the bank the prompt payment of all obligations due under the note. Thereafter, the loan to Delco was restructured and the terms of the note were modified by a modification agreement among the parties dated February 21, 1990. The guarantors of the note consented to the modification and their guarantees were not affected. Subsequently, Delco defaulted on its loan and the bank instituted an action for strict

[1] The defendants Dennis Nicotra and Great Country Bank had failed to disclose a defense in the trial court and were defaulted. They have not appealed the judgment of the trial court.

foreclosure against Delco and for deficiency judgments against Delco and the guarantors of the note. On August 9, 1991, the Director of the Office of Thrift Supervision determined that the bank was insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The FDIC was thereafter substituted for the bank as the party plaintiff in the foreclosure action.

Each of the defendants pleaded five identical special defenses to the plaintiff's action. In their first four special defenses, the defendants claimed, in essence, that the bank had failed to comply with certain federal regulations concerning appraisal and loan to value ratios. The trial court ruled against the defendants on their first four special defenses. Those rulings of the trial court have not been challenged by the defendants on appeal.

In their fifth special defense, the defendants claimed that the note secured by the mortgage had been partially paid and satisfied. The trial court rejected this defense and found that the amount due the plaintiff was the full amount of the note plus interest, attorney's fees and costs. The defendants contend that the trial court was incorrect in so finding.

The defendants argue that the note secured by the mortgage was partially paid and satisfied when the bank entered into a satisfaction agreement and an intercreditor agreement with Nicotra and Nicotra's other creditors in July, 1991. The defendants claim that, although they were not parties to those agreements, they, nevertheless, should be the beneficiaries of the reduction of $2,024,000 in the amount of the debt due the bank. The defendants assert that this was the value placed on the agreements by the bank and that the agreements were accepted as partial payment by the bank for the obligation secured by the mortgage.

The trial court concluded that "there is simply no legal or equitable basis upon which the defendants can argue that an agreement negotiated by Dennis Nicotra to satisfy his debts, which apparently failed in the end, is applicable to them." The court also concluded that the defendants' fifth special defense was not valid as to the FDIC because the agreements on which that special defense was based failed to meet all the requirements of 12 U.S.C. § 1823 (e).[2] See also *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). Accordingly, the court found that the FDIC was entitled to judgment on the outstanding principal amount of the note, plus interest.

The defendants also claim on appeal that the trial court improperly used the prime rate of Chase Manhattan Bank of Connecticut, the successor bank to Mechanics and Farmers Savings Bank to determine the interest rate to be applied to the note in question. The trial court concluded that substitution of the prime rate of Chase Manhattan Bank of Connecticut for that of Mechanics and Farmers Savings Bank, the prime rate

[2] Title 12 of the United States Code, § 1823 (e) (1989) provides: "No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

"(1) is in writing

"(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution

"(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee and

"(4) has been, continuously, from the time of its execution, an official record of the depository institution."

The trial court found that the agreements failed to satisfy subdivisions (3) and (4) of 12 U.S.C. § 1823 (e).

for which the formula in the note originally provided, was reasonable under the circumstances because Mechanics and Farmers Savings Bank had ceased to exist. It therefore calculated the interest due on the basis of the prime rate of the Chase Manhattan Bank of Connecticut.

We agree with the trial court's conclusions on both issues as set forth in its thoughtful and comprehensive memorandum of decision. *Mechanics & Farmers Savings Bank, FSB* v. *Delco Development Co.*, 43 Conn. Sup. 408, A.2d (1995). Because the court's memorandum of decision fully addresses the issues properly raised by the defendants in the present appeal, we adopt its decision as a statement of the facts and applicable law on these issues.[3] It would serve no useful purpose to repeat the discussion contained therein. *Greater Bridgeport Transit District* v. *State Board of Labor Relations*, 232 Conn. 57, 64, A.2d (1995); *Advanced Business Systems, Inc.* v. *Crystal*, 231 Conn. 378, 381, 650 A.2d 540 (1994).

The judgment is affirmed and the case is remanded to the trial court to set new law days and to order proper notice.

[3] The defendants also claim on appeal that the trial court improperly applied 12 U.S.C. § 1823 (e) retroactively in this case. They contend that because § 1823 (e) did not apply to the FDIC as a receiver until 1989, when that section was amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, it should not apply in this instance. The defendants, however, failed to raise this claim at trial. We therefore will not consider it on appeal. Practice Book § 4185; *Skrzypiec* v. *Noonan*, 228 Conn. 1, 13, 633 A.2d 716 (1993) (we will not address claims not raised before trial court); *Texaco* v. *Golart*, 206 Conn. 454, 460, 538 A.2d 1017 (1988) (same); *Enquire Printing & Publishing Co.* v. *O'Reilly*, 193 Conn. 370, 378, 477 A.2d 648 (1984) (same).

MECHANICS AND FARMERS SAVINGS BANK, FSB *v.* DELCO DEVELOPMENT COMPANY, INC., ET AL.

SUPERIOR COURT — JUDICIAL DISTRICT OF NEW HAVEN — FILE NO. 303743

Receivers; banks and banking; bills and notes; real estate; mortgages; guaranty; special defenses; unfair trade practices; equity-clean hands doctrine; whether alleged illegality of loan transaction between defendants (guarantors) and bank constituted valid defense for defendants to foreclosure; whether relief from foreclosure for defendants was warranted notwithstanding their failure to prove bank's alleged actions constituted breach of duty of good faith and fair dealing and unfair and deceptive trade practice in violation of Connecticut Unfair Trade Practices Act; whether bank's alleged violation of clean hands doctrine was valid defense for defendants to foreclosure; whether bank's alleged unconscionable conduct constituted grounds for equitable relief for defendants from foreclosure; whether plaintiff entitled to foreclosure on basis of bank's alleged status as equity partner or joint venturer with named

defendant; whether ancillary agreement between bank and defendants was enforceable accord and satisfaction defense valid against bank's receiver.

Memorandum filed August 30, 1993

Memorandum of decision in action to foreclose a mortgage. *Judgment for the plaintiff.*

Diserio, Martin, O'Connor & Castiglioni, for the plaintiff.

Green & Gross, for the named defendant.

Weinstein, Weiner & Shapiro, for the defendant Gary R. Ginsberg.

Paul M. Kaplan, for the defendant Robert A. Ginsburg.

Gager & Henry, for the defendant Great Country Bank.

Rogin, Nassau, Caplan, Lassman & Hirtle, for the defendant Dennis P. Nicotra.

LAGER, J. This action on a note, mortgage and certain guaranties was brought against the defendant Delco Development Company, Inc. (Delco), as principal and Robert A. Ginsburg, Gary R. Ginsberg and Dennis Nicotra as guarantors. The plaintiff seeks, among other things, strict foreclosure of a mortgage on certain undeveloped land located in Hamden. Nicotra was defaulted on December 9, 1991, for failure to disclose a defense. Great Country Bank, a defendant by virtue of a subordinate lien on the mortgaged property, was also defaulted for failure to disclose a defense on December 9, 1991. Delco and Robert Ginsburg and Gary Ginsberg (the defendants) answered and pleaded certain identical special defenses.

This action was originally brought by the Mechanics and Farmers Savings Bank, FSB (the bank). The Federal Deposit Insurance Corporation (FDIC) was sub-

stituted as the plaintiff by the court, *Celotto, J.*, on March 9, 1992, after it became the receiver of the bank's assets following the bank's failure on August 9, 1991.

The present case was tried before the court on July 20, 21, and 22, and on August 6, 1993. The following facts were either admitted[1] or proved by a preponderance of the evidence. On May 17, 1988, Delco borrowed $3,500,000 from the bank executing a variable rate promissory note due on June 1, 1989, secured by a mortgage deed on certain real property known as 249 Putnam Avenue, Hamden. The defendants Robert Ginsburg, Gary Ginsberg and Nicotra, who were shareholders in Delco at the time, each executed an unconditional guaranty to the bank of the principal amount of Delco's note. Each guaranty provided, among other things, for the extension or renewal of the note or its rate of interest without "affecting or releasing the liability of the Guarantor."

On February 21, 1990, the bank agreed to renew what it described as the "Delco Development Company, Inc. Loan #16109," which is the same loan that was the subject of the May 17, 1988 transaction. The renewal was subject to the following conditions: the term of the loan was extended for five years, the interest rate was modified and the repayment terms changed, one point was charged for renewal and outstanding interest through closing had to be paid. On the same date, Delco entered into a modification agreement with the bank that modified and extended the loan evidenced by the note of May 17, 1988, and secured by the mortgage of the same date. Neither a new note nor a new mortgage deed was executed. Each guaran-

[1] Delco admitted paragraphs one, two, three and twelve of the complaint, but denied paragraph eight, which alleged default. Robert Ginsburg and Gary Ginsberg admitted paragraph eight and also admitted that certain documents were executed as alleged in paragraphs one through six.

tor, however, executed written consents to the modification which stated, among other things: "Guarantor does hereby guaranty to MECHANICS AND FARMERS SAVINGS BANK FSB, or the holder of the Note, the prompt payment when due at maturity, by acceleration or otherwise, of the principal amount evidenced by the Note, as so modified, or such portion thereof as shall be outstanding, together with interest, reasonable attorney's fees and reasonable costs of collection of said amount, to the same effect as if said Guaranty dated May 17, 1988 had referred to the Note as modified." The modification agreement was recorded on the land records of the town of Hamden on March 1, 1990. Delco has made no payments on the modified loan since April 1, 1990. For the purposes of this decision, the 1988 and 1990 transactions will be referred to collectively as the loan transaction.

The defendants have raised five identical special defenses.[2] The first four special defenses rely on the same facts and allege, respectively, that the loan transaction was ultra vires and unenforceable; that the bank violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-10a et seq. (CUTPA), and breached its duty of good faith and fair dealing; that the bank was an equity partner or joint venturer with Delco; and that the bank had unclean hands. These defenses are premised on the defendants' claim that the loan transaction was in violation of federal regulation and, therefore, illegal. The fifth special defense alleges that the debt was paid and satisfied. This claim is premised on certain agreements entered into between Nicotra and his creditors, including the bank.

The FDIC has denied the special defenses and claims that they are, in large measure, barred under the doc-

[2] A request for leave to amend to add two additional special defenses was denied for the reasons stated on the record on July 20, 1993.

trine of *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) (hereafter *D'Oench*), and its progeny, as well as under 12 U.S.C. § 1823 (e). While *D'Oench* and 12 U.S.C. § 1823 (e) create substantial barriers to the successful assertion of defenses in a foreclosure action maintained by the FDIC, as a preliminary matter, the defendants' assertion that the loan transaction was unlawful must be addressed.

The contention at the heart of the first four special defenses is that the bank failed to comply with the requirements of certain federal regulations concerning appraisals and loan to value ratios. Specifically, the defendants claim that the bank did not have a signed appraisal submitted by an appropriately designated appraiser before the 1988 closing in violation of 12 C.F.R. § 545.32 (b) (1)[3] and that the 1990 modification was in excess of authorized loan to value ratios based on the most current appraisal available to the bank in violation of 12 C.F.R. § 545.32 (d).[4]

Given these claims, it is necessary to put the circumstances of the loan transaction into context. The law firm of Ginsberg, Ginsburg and Alderman represented Delco in both 1988 and 1990. The firm had also previously represented Delco in a 1987 closing with the bank of a note and mortgage on the same property.

By 1988, Robert Ginsburg and Gary Ginsberg were Delco stockholders and also had acquired a half interest in a subordinate $1,500,000 mortgage on the Delco property. Robert Ginsburg, according to his testimony,

[3] 12 C.F.R. § 545.32 (1988 ed.) provided in pertinent part: "(b) *General*—(1) *Appraisals.* An association may make a real estate loan only after a qualified person designated by its board has submitted a signed appraisal of the security property . . . ."

[4] 12 C.F.R. § 545.32 (1990 ed.) provided in pertinent part: "(d) *Loan-to-value ratios.* (1) At the time of origination, a real estate loan may not exceed 100 percent of the market value of the security property."

actively participated in the 1988 loan closing, in the negotiations leading up to the 1990 modification agreement, and in the closing of the modification agreement representing both Delco and his own interests. Robert Ginsburg is a commercial attorney who has practiced in Connecticut since 1967 and has been involved in many loan transactions.

With respect to the 1988 closing, Robert Ginsburg testified that although he understood that the bank was waiving an appraisal, he believed at the time that the transaction was in violation of federal law, assumedly 12 C.F.R. § 545.32 (b), and not enforceable. Nonetheless, his law firm issued an opinion letter to the bank after deletion of any language indicating that the loan documents conformed to federal law.

Five documents involving appraisals of the subject property were located in the files of the bank and its successor, the Consolidated Asset Recovery Corporation (the corporation). The parties stipulated that the following were in the files: (1) an appraisal dated December 10, 1986, from Estrada & Associates (Estrada); (2) an appraisal as of July 1, 1988, dated July 20, 1988, also from Estrada; (3) a letter dated October 27, 1989, from Estrada updating the July 1, 1988 appraisal (Estrada letter); (4) an appraisal dated September 30, 1989, from New England Real Estate Analysts; and (5) an appraisal dated September 8, 1992, prepared by Timothy Girian.

With respect to the 1990 modification, Robert Ginsburg testified that he had participated in discussions with officials of the bank concerning the value of the mortgaged property. He stated that based on an appraisal that the bank had obtained in the fall of 1989, the bank was seeking a significant paydown or to call the loan. In response, Nicotra indicated that he would obtain an updated appraisal but that he was only able

to procure a letter from Arthur Estrada, who had previously appraised the property. Robert Ginsburg presented this letter to the bank after it agreed to accept it. According to Scott Smith, a representative of the corporation who was familiar with the loan transaction, the value stated in this document supports a loan to value ratio of seventy-three percent at the time of the modification which would be within the limits of 12 C.F.R. § 545.32 (d).

Assuming, arguendo, that 12 C.F.R. §§ 545.32 (b) (1) and (d) apply to the loan transaction between the bank and the defendants,[5] the defendants' great reliance on the alleged regulatory violation is misplaced. The principle that a bank's violation of regulatory provisions in making a loan neither precludes recovery on the loan nor provides a defense, unless specifically provided by statute, has been established for well over 100 years. See e.g., *Gold-Mining Co.* v. *National Bank,* 96 U.S. 640, 642, 24 L. Ed. 648 (1877); annot., 125 A.L.R. 1512 (1940). Indeed, as the Supreme Court stated in 1892, "it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States and not by private parties. *National Bank* v. *Matthews,* 98 U.S. 621 [25 L. Ed. 188 (1988)]; *National Bank* v. *Whitney,* 103 U.S. 99 [26 L. Ed. 443 (1880)]; *National Bank of Xenia*

[5] Section 545.32 of title 12 of the Code of Federal Regulations governs real estate loans made by a federal savings and loan association or a federal savings bank pursuant to statutory authorization found in 12 U.S.C. § 1464 (c) (1) (B). According to John Tranquilli, the bank's loan officer involved in the commitment for the 1988 note and mortgage, the loan was considered a commercial loan on demand partially secured by real estate. If that were the case, the loan would have been made pursuant to the provisions of 12 U.S.C. § 1464 (c) (1) (R) and would not be subject to the regulations contained in 12 C.F.R. § 545.32.

v. *Stewart*, 107 U.S. 676 [2 S. Ct. 778, 27 L. Ed. 592 1882)]." *Thompson* v. *Saint Nicholas National Bank*, 146 U.S. 240, 251, 13 S. Ct. 66, 36 L. Ed. 956 (1892).

Section 545.32 governs certain real estate loans originated under the provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 et seq., as amended. That act and its underlying regulations provide for the establishment and government of authorized federal savings and loan associations and federal savings banks. The provisions of the act and the regulations are enforceable against authorized associations solely through the regulatory process. The law was not enacted for the special benefit of mortgagors. *Taylor* v. *Citizens Federal Savings & Loan Assn.*, 846 F.2d 1320, 1322–23 (11th Cir. 1988). "The broad language of [the act] expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans." *Fidelity Federal Savings & Loan Assn.* v. *De La Cuesta*, 458 U.S. 141, 161, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). The detailed administrative scheme of enforcement set forth in 12 U.S.C. § 1464 (d) strongly evidences Congressional intent for an exclusive administrative remedy for violations of the act and its regulations. See *Till* v. *Unifirst Federal Savings & Loan Assn.*, 653 F.2d 152, 160 (5th Cir. 1981).

Thus, any purported violation of the regulations by the bank with respect to the loan transaction did not make the loan void against Delco, preclude the bank from seeking to recover on the note or guaranties, or provide a defense to the foreclosure action. Furthermore, as a general matter, it would violate public policy to allow a borrower who has benefitted by obtaining an allegedly unauthorized loan to avoid its obligation of repayment, in reliance on regulations designated to protect the financial institution, to the lending institution's further detriment.

This is particularly so in light of the facts of the present case where Robert Ginsburg, concededly the attorney for at least himself and Delco, knowingly entered into the 1988 transaction believing it to be unenforceable for violations of federal law and, with respect to the 1990 modification, actively participated in the bank's reliance on the Estrada letter which supported an authorized loan to value ratio. Indeed, these facts reveal a scheme or arrangement, in which the borrower and guarantors participated, that would have the effect of deceiving the regulatory authorities. The FDIC rightly relies on the *D'Oench* doctrine and on 12 U.S.C. § 1823 (e) under these circumstances to defeat the first four special defenses.

The common law *D'Oench* doctrine and 12 U.S.C. § 1823 (e) bar the assertion against the FDIC of any defense premised on any unrecorded agreement between the borrower and a failed institution that does not satisfy all four requirements of § 1823 (e).[6] The term "agreement" under the common law and as used in § 1823 (e) is defined broadly to include all conditions upon performance; *Langley* v. *Federal Deposit Ins. Corp.*, 484 U.S. 86, 91, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987); and any "scheme or arrangement that is likely to mislead the banking authorities." Id., 93;

[6] 12 U.S.C. § 1823 (e) (1991 Sup.) provides, in pertinent part:

"No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it . . . shall be valid against the Corporation unless such agreement—

"(1) is in writing,

"(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

"(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

"(4) has been, continuously, from the time of its execution, an original record of the depository institution."

D'Oench, Duhme & Co. v. *Federal Deposit Ins. Corp.*, supra, 315 U.S. 460.

While the statute only "partially" codifies the *D'Oench* doctrine; see *Vernon* v. *Resolution Trust Corp.*, 907 F.2d 1101, 1105 (11th Cir. 1990); "courts have found the aims of section 1823 (e) and *D'Oench* identical and thus have construed defenses premised upon section 1823 (e) and *D'Oench* in tandem." *Twin Construction, Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991). "The *D'Oench* doctrine has been extended through the development of federal common-law to apply to situations other than those involving secret agreements. See *Vernon* v. *Resolution Trust Corp.*, [supra, 1106]. . . . Personal guaranties have been among the assets affected by the doctrine. See *Twin Construction, Inc.* v. *Boca Raton, Inc.*, [supra, 382]. Section 1823 (e) itself has been interpreted to prohibit the assertion against the FDIC of bank misrepresentations inducing the execution of a note and guaranty. See *Langley* v. *Federal Deposit Ins. Corp.*, [supra, 484 U.S. 91–93]." *Federal Deposit Ins. Corp.* v. *Bernstein*, 944 F.2d 101, 108 (2d Cir. 1991).

Courts have applied the common law and § 1823 (e) to protect the FDIC from a variety of claims including those premised on secret agreements, unwritten agreements, fraud in the inducement, state and common law fraud, alleged violations of federal securities laws and other federal statutes, and certain affirmative defenses. See *NCNB Texas National Bank* v. *King*, 964 F.2d 1468, 1470–71 (5th Cir. 1991); *Twin Construction, Inc.* v. *Boca Raton, Inc.*, supra, 925 F.2d 382, and cases cited therein; *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1528–29 (5th Cir. 1990), cert. denied sub nom. *Rogers* v. *Federal Deposit Ins. Corp.*, 498 U.S. 1083, 111 S. Ct. 954, 112 L. Ed. 2d 1042 (1991); *Vernon* v. *Resolution Trust Corp.*, supra, 907 F.2d 1105–1106 (and cases cited therein). "The *D'Oench* doctrine . . . estops a party

from asserting any claim against the FDIC based on oral representations, agreements, or conditions that are not reflected in the books and records of the failed bank." *First City National Bank* v. *Federal Deposit Ins. Corp.*, 730 F. Sup. 501, 510 (E.D.N.Y. 1990).

Here, the defense of illegality is premised on agreements not reflected in the books and records of the bank. Further, the evidence in the present case leaves no doubt that if the bank violated federal regulations when it agreed in 1988 to waive a required appraisal and when it agreed in 1990 to accept the Estrada letter, again in lieu of a required appraisal, it did so with the acquiescence, if not the full participation, of the defendants. The fact that certain appraisals and the Estrada letter appear in the bank's files, without more, does not satisfy the requirements of 12 U.S.C. § 1823 (e). The understandings that the bank would waive an appraisal in 1988 and accept the Estrada letter in 1990 were not memorialized in the parties' written agreement, which is the integration of the note, mortgage, guaranties, modification agreement, and consents of guarantors. See *In re Greenwich Showboat Ltd. Partnership*, 117 Bankr. 54, 57 (D. Conn. 1990), citing *Schubert* v. *Ivey*, 158 Conn. 583, 587, 264 A.2d 562 (1969). As the court in *D'Oench* stated: "If the . . . agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed . . . arrangement which the [regulation] condemns and which the maker of the note made possible." *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, supra, 315 U.S. 461.

This is not to suggest that either the bank or the defendants intended to deceive the regulatory authority by the manner in which this loan transaction was conducted. "Neither the intent to deceive nor fraud are requisites for the application of *D'Oench*. . . . 'The

statute and the cases only require that [a party] lend himself "to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled.' ". . . Such a party 'cannot rely upon that same scheme or arrangement to defend against the banking authority's subsequent actions.' " (Citations omitted.) *Twin Construction, Inc.* v. *Boca Raton, Inc.*, supra, 925 F.2d 382.

Since the claim of illegality constituting the first special defense fails here, so do the second, third and fourth special defenses, which are premised on precisely the same facts and also fall outside the express provisions of the parties' written agreement. *Federal Deposit Ins. Corp.* v. *Vernon Real Estate Investments, Ltd.*, 798 F. Sup. 1009, 1015 (S.D.N.Y.) (1992). The defendants cannot convert a defense that fails *D'Oench* into one that survives it simply by describing it differently. See *Citytrust* v. *Allen*, United States District Court for the District of Connecticut, Docket No. 5:91CV00597 EBB (July 8, 1993).

The second special defense asserts violations of the covenant of good faith and fair dealing and CUTPA. While courts have recognized that under certain circumstances the *D'Oench* doctrine would not necessarily bar a claim of breach of the covenant of good faith and fair dealing; see *Federal Deposit Ins. Corp.* v. *P.P.S. Associates*, United States District Court for the District of Connecticut, Docket No. 5:91CV00518EBB (September 25, 1992); and CUTPA violations; *Connecticut Bank & Trust Co.* v. *Lee*, Superior Court, judicial district of Stamford-Norwalk, Docket No. 11137 (April 15, 1992, 7 C.S.C.R. 1137); the second special defense is not supported by any evidence, other than the bank's alleged violation of federal regulation, which establishes bad faith; see *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 568 n.18, 479 A.2d 781 (1984); or a

CUTPA violation. See e.g., *Sportsmen's Boating Corp.* v. *Hensley*, 192 Conn. 747, 756, 474 A.2d 780 (1984).

Likewise, the third special defense attempts to convert the allegation of illegality into a claim that the bank was an equity partner or joint venturer with the defendants. It is, of course, axiomatic that by filing a special defense the defendants assume the burden of proving it. See, e.g., *Atlantic Richfield Co.* v. *Canaan Oil Co.*, 202 Conn. 234, 237, 520 A.2d 1008 (1987). There was no evidence introduced upon which it can be found that the lender-borrower-guarantor relationship between the bank and the defendants was at any time transformed into a partnership or joint venture. See *Tuxedo Beach Club Corp.* v. *City Federal Savings Bank*, 749 F. Sup. 635, 646 (D.N.J. 1990). Furthermore, any claim of equity partnership or joint venture premised on either oral agreements among the defendants and officers of the bank or the conduct of bank officials alone is barred by the *D'Oench* doctrine and 12 U.S.C. § 1823 (e). See *Resolution Trust Corp.* v. *Wellington Development Group*, 761 F. Sup. 731, 735–37 (D. Colo. 1991).

The fourth special defense again relies on the claimed violation of federal regulation but alleges unclean hands. The defense of unclean hands to a mortgage foreclosure has generally been disallowed in this state. See e.g., *Northeast Savings, F.A.* v. *Dunst*, Superior Court, judicial district of Stamford-Norwalk, Docket No. 117332 (April 15, 1992, 7 C.S.C.R. 527); *New England Savings Bank* v. *High Ridge, Inc.*, Superior Court, judicial district of Norwich, Docket No. 97113 (November 4, 1991, 5 Conn. L. Rptr. 110). Furthermore, the "clean hands doctrine is applied not for the protection of the parties but for the protection of the court." *Pappas* v. *Pappas*, 164 Conn. 242, 246, 320 A.2d 809 (1973). The facts and equities of the present case

do not require the court to deny the plaintiff relief "to protect its own integrity." Id.

The fifth special defense is one of payment. Payment, discharge, release or satisfaction are recognized defenses at common law to an action on a note and mortgage. *Petterson* v. *Weinstock,* 106 Conn. 436, 441, 138 A.2d 433 (1927); *Danbury Savings & Loan Assn., Inc.* v. *Natale,* Superior Court, judicial district of Danbury, Docket No. 305410 (October 23, 1992, 7 C.S.C.R. 1286). The defendants rely upon an agreement entered into between Nicotra and his creditors, including the bank, which addressed, among other things, the Delco mortgage. There is simply no legal or equitable basis, however, upon which the defendants can argue that an agreement negotiated by Nicotra to satisfy his debts, which apparently failed in the end, is applicable to them. See *Federal Deposit Ins. Corp.* v. *Mr. T's, Inc.,* 764 F. Sup. 1087, 1089 (M.D. La. 1991).

Furthermore, since the defendants are claiming the benefit of the Nicotra satisfaction agreement, it must meet all the requirements of 12 U.S.C. § 1823 (e). Under that section, unless the party claiming the benefit of an agreement can establish that it had a written agreement with the bank that was an original record of the bank executed "contemporaneously with the acquisition of the asset" approved by the bank's board of directors or loan committee and reflected in the appropriate minutes, the agreement is not valid against the FDIC. The Nicotra satisfaction agreement, even when viewed in light of the intercreditor agreement, fails to meet all of these conditions and cannot be asserted against the FDIC. *Langley* v. *Federal Deposit Ins. Corp.,* supra, 484 U.S. 95.

First, the defendants Delco, Robert Ginsburg and Gary Ginsberg did not execute the agreement. See *Twin Construction, Inc.* v. *Boca Raton, Inc.,* supra, 925

F.2d 384 n.5; *Federal Deposit Ins. Corp.* v. *Rivera-Arroyo*, 907 F.2d 1233, 1236 (1st Cir. 1990). Second, the agreement was executed on July 24, 1991, and, therefore, not contemporaneously with the asset being foreclosed, that is, the 1988 note and mortgage as modified in 1990. See *Federal Deposit Ins. Corp.* v. *Wright*, 942 F.2d 1089, 1100 (7th Cir. 1991), cert. denied, U.S. , 112 S. Ct. 1937, 118 L. Ed. 2d 544 (1992); *Federal Deposit Ins. Corp.* v. *Manatt*, 922 F.2d 486, 489–90 (8th Cir.) (Gibson, J., concurring), cert. denied, U.S. , 111 S. Ct. 2889, 115 L. Ed. 2d 1054 (1991); *Resolution Trust Corp.* v. *Crow*, 763 F. Sup. 887, 892–94 (N.D. Tex. 1991); *Federal Deposit Ins. Corp.* v. *Friedland*, 758 F. Sup. 941, 943 (S.D.N.Y. 1991). Third, the only evidence that the agreement was approved by the bank was the testimony of Nicotra's attorney that he saw what purported to be the approval of a committee of the bank's board. Even if the court could infer from this testimony that the agreement was approved as required by § 1823 (e) (3), the court cannot infer that such approval is reflected in the appropriate minutes. The actual minutes were not offered into evidence. See *Federal Deposit Ins. Corp.* v. *Manatt*, supra, 489; *Federal Deposit Ins. Corp.* v. *P.L.M. International, Inc.*, 834 F.2d 248, 253 (1st Cir. 1987). Thus, the fifth special defense also fails.

In sum, all five special defenses have failed and the evidence has established that the 1988 note and mortgage, the 1988 guaranties, the 1990 modification agreement and the 1990 consent of guarantors were properly executed and Delco has been in default since April 19, 1990. The FDIC, therefore, is entitled to judgment on the outstanding principal amount of $3,500,000 plus interest.

Since the note and modification agreement both provided for interest to accrue according to a formula employing the "Prime Rate of Mechanics and Farmers

Savings Bank, FSB," a failed institution, the court must determine a reasonable rate of interest by examining the documents and testimony to determine the parties' intent. See *Federal Deposit Ins. Corp.* v. *Blanton*, 918 F.2d 524, 532 (5th Cir. 1990); *Federal Deposit Ins. Corp.* v. *La Rambla Shopping Center*, 791 F.2d 215, 223 (1st Cir. 1986); *Federal Deposit Ins. Corp.* v. *Cage*, 810 F. Sup. 745, 747 (S.D. Miss. 1993). The note and modification agreement provided for a varying rate of interest which was "not necessarily the lowest or most favorable" offered by the bank. Further, both documents provided that if the bank "change[d] its name, merge[d] with another institution or otherwise alter[ed] its corporate identity, the term 'Mechanics and Farmers Savings Bank FSB' . . . shall be deemed to refer to its successor." Lynn Quido, the corporation's chief financial and administrative officer, testified that she was instructed to use the prime rate of the successor bank, Chase Manhattan Bank of Connecticut, in connection with the loan transaction and that it is a routine practice to use the prime rate of a successor bank.

The court finds that the substitution of the prime rate of the successor bank is reasonable under the circumstances of the present case and will calculate interest based on the figures submitted by the plaintiff. Exhibit Q indicates interest calculated on the principal amount of $3,500,000 through July 19, 1993, in the amount of $1,165,840.28 and accruing at a per diem rate of $777.7778. Interest as of the date of this decision totals $1,198,506.95. The court, therefore, finds the debt as of the date of this decision to be $4,698,506.95.

The parties stipulated that for the purposes of this hearing the appraiser could testify through oath and affidavit of appraiser. Accordingly, an oath and affidavit of appraiser, with attached appraisal report, were submitted stating a fair market value of the subject

property of $1,545,000. The court finds, therefore, for the purposes of this hearing that the fair market value of the subject property consisting of 10.55 acres of unimproved land is $1,545,000.

Accordingly, since the debt far exceeds the fair market value of the property, a judgment of strict foreclosure shall enter. The following fees are awarded: a title search fee in the amount of $150, an appraisal fee in the amount of $3000, and attorney's fees in accordance with the amount requested in the affidavit in support of request for attorney's fees dated August 3, 1993, and filed August 6, 1993. The first law day is set on November 9, 1993, and on succeeding banking days for subsequent encumbrancers in inverse order of their priorities.

Supreme Court, U.S.
FILED
SEP 22 1995

No. 95-111

In the Supreme Court of the United States

OCTOBER TERM, 1995

DELCO DEVELOPMENT COMPANY, INC., ET AL., PETITIONERS

v.

MECHANICS AND FARMERS SAVINGS BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER, IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
ROBERT D. MCGILLICUDDY
CHRISTOPHER J. BELLOTTO
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether, in a suit by the Federal Deposit Insurance Corporation, as receiver, to enforce petitioners' loan guaranties, the Connecticut Supreme Court correctly rejected petitioners' assertion of a defense based on a co-guarantor's satisfaction agreement with the failed savings bank.

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER, IN OPPOSITION

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 1A-5A) is reported at 656 A.2d 1034. The opinion of the Connecticut Superior Court (Pet. App. 6A-22A) is reported at 656 A.2d 1075.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on April 11, 1995. The petition for a writ of certiorari was filed on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On May 17, 1988, petitioner Delco Development Company borrowed $3,500,000 from Mechanics and Farmers Savings Bank (the Bank). The loan was evidenced by a variable rate promissory note (the Note), and secured by a mortgage on real property (the Mortgage), both dated May 17, 1988. Dennis Nicotra, and petitioners Robert Ginsburg and Gary Ginsberg, who were shareholders in Delco, each executed an unconditional written guaranty of all of the obligations due under the Note. Pet. App. 2A, 8A. On February 21, 1990, Delco and the Bank executed a modification agreement, altering the interest rate on the Note and extending the maturity date of the loan. The guarantors consented in writing to those modifications, and each expressly guaranteed Delco's prompt payment of the Note, as modified. *Id.* at 2A, 8A-9A. Shortly thereafter, Delco defaulted on the loan. *Id.* at 2A, 9A.

2. On or about August 28, 1990, the Bank commenced foreclosure proceedings in Connecticut Superior Court, and sought a deficiency judgment against Delco and the guarantors. FDIC C.A. Br. 3; Pet. App. 2A-3A. On August 9, 1991, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for the Bank; the FDIC was substituted as plaintiff on March 9, 1992. Pet. App. 8A.

Petitioners pleaded five special defenses. Pet. App. 3A, 9A. The first four alleged, on various grounds, that the loan transaction was ultra vires and unenforceable. *Ibid.* The fifth special defense was based on a July, 1991, agreement among Nicotra, the Bank, and Nicotra's other creditors (the Nicotra Agreement), which restructured, modified, compro-

mised, and liquidated Nicotra's various debts. *Ibid.*; FDIC C.A. Br. 4. Petitioners were not parties to the Nicotra Agreement. They claimed, however, that the Bank stood to receive a $2 million benefit from that agreement, and they contended, on that ground, that Nicotra's execution of the agreement constituted a $2 million partial payment of the outstanding balance on the Delco loan. Pet. App. 3A.

After a bench trial, the court rejected all five special defenses[1] and entered a Judgment of Strict Foreclosure. Pet. App. 6A-22A. Addressing petitioners' fifth special defense, the trial court disagreed with petitioners' contention that the execution of the Nicotra Agreement was tantamount to a partial payment of the loan. In the court's view, petitioners had "no legal or equitable basis * * * upon which * * * [to] argue that an agreement negotiated by Nicotra to satisfy his debts, [an agreement] which apparently failed in the end, [could be] applicable to them." *Id.* at 19A. The court also ruled, in the alternative, that petitioners could not raise the Nicotra Agreement as a defense to the FDIC's enforcement of their guaranties because the agreement did not comply with the requirements of 12 U.S.C. 1823(e) (Supp. V 1993).[2] The court noted that

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[1] Petitioners did not appeal the trial court's rejection of their first four special defenses, Pet. App. 3A, and those determinations are therefore no longer at issue.

[2] 12 U.S.C. 1823(e) (Supp. V 1993) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any

the Nicotra Agreement was neither signed by petitioners, nor executed contemporaneously with acquisition of the asset being foreclosed, *i.e.*, the 1988 Note, as modified in 1990. Additionally, the court was not persuaded that the Nicotra Agreement was ever approved by the Bank's board of directors or reflected in the board's minutes, since petitioners offered no copies of actual minutes into evidence at trial. Pet. App. 20A.

3. Petitioners appealed to the Connecticut Appellate Court. While their appeals were pending, petitioners filed with the trial court a Motion for Articulation, inquiring whether the court had held that a 1989 amendment to Section 1823(e), which extended the protections of the statute to the FDIC, in its capacity as receiver, was retroactively applicable to the loan transaction. The trial court refused to rule, at that stage of the proceedings, on the retroactivity question:

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insured depository institution, shall be valid against the Corporation unless such agreement—

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

> The Defendants, despite ample opportunity by way of pre-trial and post-trial briefs and arguments, did not claim at trial that §1823(e) was inapplicable to the transactions in question, nor did they raise any issue of retroactivity. Therefore, this court declines to answer the question presented in the Motion for Articulation.

FDIC C.A. Br. 7-8.

4. The Connecticut Supreme Court took jurisdiction of the case from the Appellate Court and affirmed. Pet. App. 2A. It observed that the trial court had rejected petitioners' fifth special defense as both (i) unfounded in law or equity and (ii) barred by Section 1823(e). *Id.* at 4A. Agreeing with those conclusions, it adopted the trial court's decision "as a statement of the facts and applicable law." *Id.* at 5A. The court declined to address petitioners' retroactivity argument, because of petitioners' failure to raise the claim at trial. *Id.* at 5A n.3.

ARGUMENT

1. Petitioners argue (Pet. 12-26) that the Connecticut Supreme Court erred in concluding that 12 U.S.C. 1823(e) (Supp. V 1993) barred their assertion of the Nicotra Agreement as a defense to enforcement of their guaranties. Petitioners point out (Pet. 14) that, while the Note was executed in 1988, the protections of Section 1823(e) were not extended to the FDIC, in its capacity as receiver, until Congress amended the statute in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. In petitioners' view, Section 1823(e) cannot lawfully be applied "to defeat defenses relating to a transaction whose genesis predated the effective date of [FIRREA]." Pet. 22.

There is some disagreement among the courts of appeals respecting the retroactive application of Section 1823(e) to bar defenses against claims made by the FDIC, as receiver. Compare *FDIC* v. *Wright*, 942 F.2d 1089, 1095-1097 (7th Cir. 1991) (applying Section 1823(e) to bar assertion of pre-FIRREA agreement as defense against the FDIC, as receiver), cert. denied, 504 U.S. 909 (1992); *FDIC* v. *Kasal*, 913 F.2d 487, 493 (8th Cir. 1990) (same), cert. denied, 498 U.S. 1119 (1991); and *FDIC* v. *Longley I Realty Trust*, 988 F.2d 270, 273-274 (1st Cir. 1993) (same) with *Oklahoma Radio Associates* v. *FDIC*, 987 F.2d 685, 695-696 (rejecting retroactive application of the statute), motion to vacate denied, 3 F.3d 1436 (10th Cir. 1993). That issue, however, is not presented in this case.

a. The trial court rejected petitioners' assertion that the Nicotra Agreement decreased petitioners' exposure on the Delco loan by $2 million, because the court concluded that "[t]here [wa]s simply no legal or equitable basis * * * upon which [petitioners] c[ould] argue that an agreement negotiated by Nicotra to satisfy his debts * * * [wa]s applicable to them." Pet. App. 19A. In light of the court's observation (*ibid.*) that the Nicotra Agreement "apparently failed in the end," its conclusion that the execution of the agreement did not affect petitioners' obligations on the loan appears sound. The court's state-law-based ruling in that regard was, in all events, a sufficient ground for its rejection of petitioners' defense. The court's alternative holding respecting the preclusive effect of Section 1823(e) was, therefore, not necessary to its disposition of the case. That holding is accordingly not subject to further review. See *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983)

(Court lacks jurisdiction over the judgment of a state court that rests on both federal and non-federal grounds "if the non-federal ground is independent of the federal ground and adequate to support the judgment") (quoting *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)).

b. Petitioners are, moreover, procedurally barred from protesting that the trial court erred in applying Section 1823(e) retroactively. When a petitioner seeks review of a state court determination, "[a]t a minimum, * * * there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of [their] federal claim at the time and in the manner required by the state law." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981). In this case, the Connecticut Supreme Court declined to address petitioners' retroactivity argument, in accord with well-settled Connecticut law, because of petitioners' failure to raise that argument at trial. Pet. App. 5A n.3. See Connecticut Practice Book § 4185; *Skrzypiec* v. *Noonan*, 633 A.2d 716, 722 (Conn. 1993) (supreme court will not address claims not raised before trial court); *Texaco, Inc.* v. *Golart*, 538 A.2d 1017, 1020 (Conn. 1988) (same); *Enquire Printing & Publishing Co.* v. *O'Reilly*, 477 A.2d 648, 652-653 (Conn. 1984) (same).

Petitioners correctly note (Pet. 13) that this Court may, on due process grounds, disregard a state court's application of a procedural bar when the bar is not applied "evenhandedly to all similar claims," *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-265 (1982), but petitioners have made no showing that the Connecticut Supreme Court's refusal to consider

their retroactivity argument in this case conflicts with that court's treatment of procedural default in any similar case. While petitioners claim that the retroactive application of Section 1823(e) was cognizable as "plain error," the plain error doctrine is generally reserved, under Connecticut law, for circumstances in which there has been "[a]n oversight of a clearly applicable statute," *Hartford Fed. Sav. & Loan Ass'n* v. *Tucker*, 436 A.2d 1259, 1260 (Conn. 1980), or an error that "implicate[s] a constitutional right or an important, general interest," *Golart*, 538 A.2d at 1020. As we have noted, three of the four courts of appeals that have addressed the retroactive application of Section 1823(e) have concluded that the statute applies retroactively to bar defenses against claims made by the FDIC, as receiver. Regardless of whether those decisions are correct (as we believe they are[3]) they constitute the clear weight of authority, and it is difficult to see how the trial court could have committed "plain error" by following them.

c. In any event, even if there were not an independent and adequate state ground for the judgment, and even if petitioners had not waived the argument through procedural default, this case would still be an inappropriate vehicle for resolving whether the 1989 amendment to Section 1823(e) applies retroactively because, in this case, the trial court applied the statute prospectively. This case bears no resemblance to *Oklahoma Radio Associates* v. *FDIC*, *supra*, where the execution of the relevant agreement and the appointment of the FDIC as receiver both pre-dated

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[3] See *Wright*, 942 F.2d at 1095-1097 (explaining rationale for retroactive application).

FIRREA. 987 F.2d at 688. Here, the agreement at issue—the Nicotra Agreement—was executed in July, 1991, Pet. App. 3A, and the FDIC was not appointed as receiver until August, 1991, *ibid.* The events that triggered the application of Section 1823(e), therefore, occurred almost two years after the statute was amended by FIRREA.[4]

2. Petitioners also argue (Pet. 26-27) that the Connecticut Supreme Court erred in concluding that the Nicotra Agreement failed to satisfy Section 1823(e). As noted, because the state court's judgment rested on independent and adequate state grounds, its application of Section 1823(e) to the facts of this case is not subject to further review. In all events, petitioners' are incorrect in asserting that the Nicotra Agreement satisfied Section 1823(e). As this Court has observed, a party asserting the existence of an agreement as the basis for a claim or defense against the FDIC must demonstrate compliance with all of the statute's requirements. *Langley* v. *FDIC*, 484 U.S. 86, 95 (1987). Those requirements include the requirement that the agreement have been "approved by the board of directors of the depository

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[4] It is irrelevant that the underlying loan transaction was initiated prior to FIRREA. The trial court did not prevent petitioners from asserting a defense based on the Note or the Mortgage, and it did not hold that either of those documents failed to comply with Section 1823(e). But even if the date of the underlying transaction were somehow relevant to the analysis, the original loan documents were modified, and the guarantors tendered written consents to those modifications, in February, 1990. Pet. App. 8A-9A. As petitioners observe (Pet. 23), the 1988 and 1990 transactions were essentially "*one* transaction," and that transaction was completed only after FIRREA's 1989 enactment.

institution or its loan committee, * * * [and] reflected in the minutes of said board or committee." 12 U.S.C. 1823(e)(3) (Supp. V 1993). Here, although petitioners' counsel testified that the Nicotra agreement was approved by the Bank's board of directors or loan committee and reflected in the minutes, the trial court was not convinced by that testimony, see Pet. App. 20A, and petitioners failed to offer into evidence actual minutes to substantiate their claim, *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
ROBERT D. MCGILLICUDDY
CHRISTOPHER J. BELLOTTO
Counsel
Federal Deposit Insurance Corporation

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